Supreme Court, U.S.
FILED

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No. ——

In the Supreme Court of the United States

PARAGUAY HUMANITARIAN FOUNDATION, INC., F/K/A CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON, and JORGE RALPH GALLO QUINTERO,

Petitioners,

v.

BANCO CENTRAL DEL PARAGUAY, ON BEHALF AND AS ASSIGNEE OF BANCO UNION S.A.E.C.A. AND BANCO ORIENTAL S.A.I.F.E.C.A., BANCO UNION S.A.E.C.A., and BANCO ORIENTAL S.A.I.F.E.C.A.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Rule 4(m) of the Federal Rules of Civil Procedure, which expressly provides that its 120-day time limit for serving a complaint "does not apply to service in a foreign country," authorizes a district court to dismiss a complaint as untimely if a litigant attempts service in a foreign country after 120 days.

2.* Whether a defendant is entitled to setoff its contract claim against a non-party assignor against a plaintiff-assignee's judgment.

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* Petitioners intend to argue this question if the petition for a writ of certiorari is granted and raise it here in order to preserve the question.

PARTIES TO THE PROCEEDING

The following parties were defendants, counterclaimants, and third-party plaintiffs in the district court and appellants in the court of appeals: Paraguay Humanitarian Foundation, Inc., f/k/a CQZ Humanitarian Foundation, Inc., CQZ Holding Corp., Avijos, Inc., Jose M. Avila, Ronald L. Wolfson, and Jorge Ralph Gallo Quintero ("Defendants").

The following parties were plaintiffs, counter-defendants, and third-party defendants in the district court and appellees in the court of appeals: Banco Central Del Paraguay, on behalf and as assignee of Banco Union S.A.E.C.A. and Banco Oriental S.A.I.F.E.C.A., Banco Union S.A.E.C.A., and Banco Oriental S.A.I.F.E.C.A.

In the district court, John W. Tulac was a nominal defendant, and Citibank, N.A., was a garnishee.

RULE 29.6 STATEMENT

Petitioners Paraguay Humanitarian Foundation, Inc. f/k/a CQZ Humanitarian Foundation, Inc., Avijos, Inc., and CQZ Holding Corp. state that none of them has a parent corporation, and no publicly held corporation owns ten percent or more of any of their stock.

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The order of the United States Court of Appeals for the Second Circuit (App., *infra*, 1a-7a) is not reported. The opinions of the district court (App., *infra*, 10a-13a, 17a-27a, and 28a-47a) are also unreported.

JURISDICTION

The court of appeals entered judgment on February 18, 2010. The district court had jurisdiction under 28 U.S.C. § 1332. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Rule 4(m) of the Federal Rules of Civil Procedure provides:

> Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

The full text of Rule 4 is reprinted in an appendix to this petition. App., *infra*, 48a-60a.

INTRODUCTION

Rule 4(m) of the Federal Rules of Civil Procedure, by its plain text, exempts "service in a foreign country" from the requirements that a complaint be served within 120 days and that the serving party show good cause to avoid dismissal where service is not made within 120 days. Despite this clear exemption and contrary to the interpretation adopted by other courts of appeals, the court of appeals affirmed the dismissal of Defendants' third-party complaint – which Defendants had attempted to serve in Paraguay – on the grounds that Defendants had not attempted service within 120 days of filing and that Defendants had not explained their failure to do so.

The interpretation of Rule 4(m) applied by the court of appeals – entirely divorced from the text of that rule – deepens an existing split among the circuits. It threatens to exacerbate the disarray in the district courts over how the timeliness of service in a foreign country should be assessed, including whether a plaintiff must attempt to serve a defendant in a foreign country within the 120-day time limit in Rule 4(m) in order to benefit at all from the exception to this same time limit. The increasing importance and frequency of cross-border litigation in the federal courts makes uniformity on this basic question of federal civil procedure imperative. This case presents an ideal and rare opportunity for this Court to provide guidance on the meaning of Rule 4(m), and this Court should seize it.

STATEMENT

This case arises out of a series of agreements executed in 2000 between Defendants and two Paraguayan banks – Banco Union S.A.E.C.A. ("Banco Union") and Banco Oriental S.A.I.F.E.C.A. ("Banco Oriental"). Banco Union and Banco Oriental promised to invest, and did invest later that year, in a variety of development projects to be managed by Defendants. The banks' eventual breach of these agreements, however, led Defendants to file a third-party complaint against the banks, in litigation that was originally initiated by plaintiff Banco Central del Paraguay ("Banco Central"). The district court's dismissal of this complaint and the affirmance of that dismissal by the court of appeals are the primary subjects of this petition.

The parties executed their first agreement on March 13, 2000. That day, Juan Fernando Rodriguez Leith ("Rodriguez Leith"), who held a power of attorney granted by the liquidators[1] of Banco Union and Banco Oriental to manage a Reserved Funds Investment Program on the banks' behalf, JA-302–03,[2] signed a notarized Letter of Intent addressed to Defendant Paraguay Humanitarian Foundation ("PHF").[3] JA-201-02. This Letter stated the banks'

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[1] Banco Union and Banco Oriental entered liquidation proceedings in Paraguay in 1998.

[2] Throughout this petition, "JA" will be used to refer to the Joint Appendix filed with the court of appeals.

[3] The Letter of Intent was addressed more specifically to "CQZ Holding Trust Human. Foundation." CQZ Humanitarian

"intent to participate in a[] placement program[] opportunity," and that Banco Union and Banco Oriental had $16,000,000 available for placement. JA-201. The banks promised their funds to be "clean, clear, free of all liens and encumbrances and of non-criminal origin," and the banks gave PHF, "with full corporate responsibility[,] . . . full and non-restrictive exclusivity" of the assets for one year and two weeks. JA-201–02.

The parties followed up the next day, March 14, 2000, with a Joint Venture Agreement between Banco Union, Banco Oriental, and PHF, again signed by Rodriguez Leith on behalf of the banks. JA-204–07. Under this agreement, the banks were to deliver $16 million to PHF – $2 million "for the performance of initial procedures related to the investment plan," and the remaining $14 million "to be managed for purposes of the investment plan by" PHF. JA-206. A related entity, CQZ Holding Trust, was to have "the responsibility of rating the partners of the joint venture from the banking point of view." *Id.* Banco Union and Banco Oriental would "receive the profits of the investment and . . . direct them towards compliance with the parameters of the project," and the Agreement provided that "in the event the investment plan is not carried out, instruments deposited in the form of cash and/or demand draft shall be reimbursed without suffering damage or loss

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Foundation, Inc., was the predecessor organization to the Paraguay Humanitarian Foundation. JA-658–60. This petition refers to the two entities together as Paraguay Humanitarian Foundation except when quoting directly from documents that reference CQZ Humanitarian Foundation, Inc., or CQZ Holding Trust, a related entity. *See* JA-161.

of value for any reason whatsoever." *Id.* The Agreement also stated that "[t]he laws of the State of New York . . . shall govern this Joint Venture Agreement." JA-207.

A separate agreement further confirmed the terms of the investment. JA-361. This agreement discussed the envisioned "project management plan" and arose out of meetings between Defendants, representatives of Banco Union and Banco Oriental, and representatives from the government of Paraguay – a then-Director of plaintiff Banco Central, and the then-Paraguayan Superintendent of Banks. *See id.*; JA-96; JA-100.

Pursuant to these agreements, in March and April 2000, Banco Union and Banco Oriental sent the promised $16 million to two trust accounts in the United States. *See* JA-260–61; JA-285–87; JA-25. In June of 2000, Rodriguez Leith authorized the transfer of $14 million from one of the trust accounts to accounts controlled by PHF and, by letter, dictated that the funds would be in the hybrid form of a $4 million contribution and a $10 million loan, with his "understand[ing] that [the] contribution w[ould] be used to conduct a feasibility study and cost analysis of a proposed hospital project in Paraguay and to begin work on a feasibility study for infrastructure development in Paraguay," and "to pay for the reasonable operating expenses of the Foundation." JA-362. A separate "Loan Agreement" confirmed these terms. JA-364–66.

Defendants had little reason to doubt the banks' intent or their ability to provide the funds promised in the various investment agreements. Indeed, a few

months later, Defendants received a memorandum from Banco Central officials that anticipated a further $114-million equity investment by Banco Central that would also reimburse the initial $14-million investments by Banco Union and Banco Oriental. JA-367; JA-130. In addition, PHF retained the James Mintz group, an investigative services firm, to verify the provenance of the funds it had received. *See* JA-344–58. This firm confirmed that it was "unaware of any evidence that the funds at issue came from an illegal source or are connected to illegal activity." JA-345.

Shortly thereafter, PHF, in support of its mission and in accordance with its agreements with Banco Union and Banco Oriental, began investigating the possibility of building three hospitals in Paraguay, as well as an aqueduct and a gas pipeline. JA-130; JA-173; JA-97. Various of the Defendants met with several companies with expertise in designing and building hospitals to discuss the hospital needs in Paraguay. JA-173. They also met with representatives from Duke Power regarding a water pipeline, and representatives of AON regarding the insurance needs of the project. *Id.* PHF also engaged KPMG LLP to prepare a development plan. JA-97; JA-101. KPMG produced a 15-volume report on Paraguay, including a detailed, multi-phased development plan. *See id.*

Following negative and misleading reports in the Paraguayan press in January 2001, App., *infra*, 34a; JA-97, Banco Union and Banco Oriental reneged on the various investment agreements and sought an immediate return of their $16-million investment. In conjunction with this effort, representatives of these

banks executed assignments of their interests in the $16 million to Banco Central.

Acting pursuant to these assignments, Banco Central filed a lawsuit in the United States District Court for the Southern District of New York on November 1, 2001, under that court's diversity jurisdiction, alleging claims of conversion, constructive trust, and conspiracy – but no contract claims – under New York law. Along with their answer and affirmative defenses, Defendants filed counterclaims and a third-party complaint against Banco Union and Banco Oriental. Unlike the original complaint, this third-party complaint addressed the banks' breach of their agreement with Defendants. This third-party complaint is the primary focus of this petition.

In their third-party complaint, Defendants alleged that Banco Union and Banco Oriental entered into contracts with PHF in which they promised to provide $16,000,000 in financing for PHF projects. JA-100; JA-102. Defendants further alleged that the banks breached their contractual obligation to provide the financing "by imposing unreasonable and impossible conditions upon the use of their money after transferring it to [the Paraguay Humanitarian Foundation]." JA-102.

The district court granted Banco Central's motion for summary judgment on the conversion claim on January 7, 2005. App., *infra*, 28a-47a. In doing so, the district court did not address any of the issues raised in Defendants' third-party complaint: It did not ascertain the existence of the contracts, their terms, whether any party breached their contractual

promises, or whether there were any potential defenses to breach under contract law.

On October 31, 2005, the district court dismissed the third-party complaint against Banco Union and Banco Oriental pursuant to Rule 4(m), again avoiding the merits of Defendants' contract claims. App., *infra*, 17a-27a. The court acknowledged that "Rule 4(m) does not apply to service in a foreign country," *id.* at 26a, but relying only on Rule 4(m) and the practices of other courts in the district, nonetheless applied a judicially created "'flexible due diligence standard to determine whether service of process was timely.'" *Id.* (quoting *Travers Tool Co. v. S. Overseas Express Line, Inc.*, No. 98-cv-8464, 2000 WL 194781, at *1 (S.D.N.Y. Feb. 17, 2000)). Under this standard, the district court concluded "that [the] Principal Defendants ha[d] not been diligent in attempting service on Banco Union and Banco Oriental" and that "the Principal Defendants ha[d] not shown good cause for the failure of service, *see* Fed. R. Civ. P. 4(m)," and therefore dismissed Defendants' third-party complaint. *Id.* at 26a-27a.

Defendants appealed, but the court of appeals affirmed the district court's judgment by summary order dated February 18, 2010. *Id.* at 1a-7a. Like the district court, the court of appeals did not reach the merits of Defendants' contract claims at all. In affirming the banks' conversion claim, the court concluded only that the "claim is not predicated on the alleged contract" as it "does not ask for the profits of the investment, nor does it ask for the return of its

money because the investment plan was not carried out." *Id.* at 5a (internal quotation marks omitted).[4]

The court of appeals also affirmed the district court's dismissal of Defendants' third-party complaint on Rule 4(m) grounds. The court stated that it "ha[d] previously held inapplicable the foreign country exception to [Rule] 4(m)'s 120-day time limit for service where a party did not attempt service within the 120-day limit and 'ha[d] not exactly bent over backward to effect service.'" App., *infra*, 7a (quoting *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985)). Applying the Second Circuit's abuse-of-discretion standard of review generally applicable to dismissals pursuant to Rule 4(m), the court of appeals concluded that the district court did not "abuse[] its discretion" in dismissing the complaint where Defendants attempted service after 120 days had passed, and did not succeed in effecting service or explain why not. *Id.* at 7a.

Because the court of appeals affirmed the dismissal on Rule 4(m) grounds, it also did not address the merits of the contract claims in Defendants' third-party complaint – most notably, whether Banco Union or Banco Oriental had a contractual obligation to provide a $16,000,000 investment, even if their initial attempt to fulfill this obligation was defective.

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[4] The court of appeals determined that the basis for the conversion claim was that "the money was unlawfully transferred out of Paraguay," App., *infra*, 5a, presumably relying on Article 147 of the Paraguayan General Banking Law, which states, "The sums collected by the liquidator during the course of the proceeding shall be deposited in the name of the institution in liquidation, in one or more local banks." JA-646.

REASONS FOR GRANTING THE PETITION

A. The Second Circuit's Interpretation of Rule 4(m) Deepens an Existing Conflict Over the Proper Standard for Timely Service in a Foreign Country

The split of authority in the courts of appeals over the interpretation of the foreign country exception in Rule 4(m) is both deep and broad. It is starkly illustrated by a comparison of the Second Circuit's decision in this case and that of the Ninth Circuit in *Lucas v. Natoli*, 936 F.2d 432 (9th Cir. 1991) (per curiam). The Second Circuit stated here that the "foreign country exception" to the Rule is "inapplicable" "where a party d[oes] not attempt service within the 120-day limit," and affirmed the district court's exercise of its "discretion" to dismiss based on Defendants' failure to "explain why they had not been able to effect service." App., *infra*, 7a. But the Ninth Circuit in *Lucas*, faced with the same question the Second Circuit considered in this case, reached opposite conclusions.

Unlike the Second Circuit, the Ninth Circuit concluded that the plain text of the Rule[5] allowed for no other interpretation but that the 120-day time limit does not apply to service in a foreign country. *See*

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[5] The Ninth Circuit reviewed Rule 4(j), the predecessor to Rule 4(m). The last sentences of the new and old rules are the same in all relevant respects. *Compare* Fed. R. Civ. P. 4(j), 96 Stat. 2527 (1983) (superseded 1993) ("This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.") *with* Fed. R. Civ. P. 4(m) ("This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).").

Lucas, 936 F.2d at 432-33. Under the Ninth Circuit's view, a district court's dismissal for untimely foreign service could not be authorized by the Rule. The Ninth Circuit also expressly rejected the conclusion reached by the Second Circuit that the Rule requires that service be attempted within 120 days in order for the foreign country exception to apply. *Lucas*, 936 F.2d at 433.

This split goes beyond these two circuits. There is considerable disagreement amongst the courts of appeals as to whether a district court is authorized to dismiss a complaint for untimeliness where a plaintiff attempts service in a foreign country. Under the Ninth Circuit's interpretation, the fact that the time limit in Rule 4(m) does not apply where service is in a foreign country carries out the rule's clear dictate that it not serve as the basis for dismissal for delayed service in such cases, though other rules may nonetheless provide means for addressing failures to serve foreign parties. *See Lucas*, 936 F.2d at 432-33. Therefore, a district court's dismissal for untimeliness of service, as occurred in this case, would not be authorized by Rule 4(m). The Seventh Circuit appears to agree. *See Nylok Corp. v. Fastener World Inc.*, 396 F.3d 805, 806-07 (7th Cir. 2005); *O'Rourke Bros., Inc. v. Nesbitt Burns, Inc.*, 201 F.3d 948, 952 (7th Cir. 2000) (intimating that the proper remedy for failure to effect service in a foreign country is dismissal under Rule 41(b) for failure to prosecute rather than under Rule 4(m)). In *Nylok*, the Seventh Circuit reversed a district court's dismissal for untimely service where the plaintiff had attempted service in Taiwan and Korea. 396 F.3d at 806-07. It stated that "[t]he explicit language of this rule makes it very clear that the 120-day limit is inapplicable in cases involving

service in a foreign country." *Id.* at 807. Thus the Seventh Circuit, like the Ninth, finds that Rule 4(m) does not permit a district court to dismiss a complaint for untimeliness where service is in a foreign country. Because the Seventh and Ninth Circuits do not permit a Rule 4(m) dismissal for untimely foreign service, they do not review a district court's decision to dismiss on this ground for abuse of discretion. *See Nylok*, 396 F.3d at 806-07 (no mention of abuse of discretion standard); *Lucas*, 936 F.2d at 432-33 (same).

In contrast, both the Second and the Third Circuits state, without reference to any rule of federal procedure, that district courts have "broad discretion" to dismiss a complaint for improper service, including for untimeliness, even where service is in a foreign country. *See Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1354, at 585 (1969)); *Umbenhauer v. Woog*, 969 F.2d 25, 31-32 (3d Cir. 1992) (recognizing that there is "no time bar" where service is in a foreign country but nonetheless analyzing whether service was "eminently feasible" and reviewing the district court's dismissal for untimeliness for abuse of discretion). Both of these circuits review a district court's dismissal pursuant to Rule 4(m) for an abuse of discretion, making no exception for service in a foreign country despite the plain text of the rule to the contrary. *See* App., *infra*, 7a (citing *Nagy v. Dwyer*, 507 F.3d 161, 163 (2d Cir. 2007)); *Umbenhauer*, 969 F.2d at 32.

The courts of appeals also disagree over whether a plaintiff must attempt service within 120 days in order for the foreign country exception even to apply. The Second Circuit stated here that service must be

attempted within 120 days in order for the foreign country exception to apply. App., *infra*, 7a (citing *Montalbano*, 766 F.2d at 740). The Ninth Circuit flatly disagrees. *See Lucas*, 936 F.2d at 433 (rejecting appellants' argument that service must be attempted within 120 days). The Seventh Circuit, meanwhile, appears to align itself with the Second Circuit on this particular issue. *See Nylok*, 396 F.3d at 807 (stating that dismissal may be proper if a plaintiff "ma[kes] no attempt to begin the process of foreign service within 120 days").

This lack of coherence in the circuits exacerbates the inconsistencies in the district courts. A number of district courts have adopted a "flexible due diligence" standard to assess the timeliness of service in a foreign country.[6] But this standard has yet to be endorsed or

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[6] *See United States ex rel. Thomas v. Siemens AG*, No. 09-cv-4414, 2010 WL 1688582, at *13-14 (E.D. Pa. Apr. 23, 2010); *Parker v. Cincinnati, Inc.*, No. 08-cv-3239, 2009 WL 3585770, *1-2 (C.D. Ill. Oct. 26, 2009); *Mapping Your Future, Inc. v. Mapping Your Future Servs., Ltd.*, No. CIV. 09-4015, 2009 WL 3105565, at *3-4 (D.S.D. Sept. 23, 2009); *Meeker v. Burns*, No. 08-CV-004219 JLH, 2009 WL 2568701, at *4 (E.D. Ark. Aug. 18, 2009); *3M Co. v. Darlet-Marchante-Technologie SA*, No. 08-cv-827 (JNE/SRN), 2009 WL 1228245, at *4-5 (D. Minn. May 5, 2009); *SEC v. Shehyn*, No. 04-cv-2003, 2008 WL 6150322, at *4 (S.D.N.Y. Nov. 26, 2008); *Steinberg v. Barclay's Nominees (Branches) Ltd.*, No. 04-60897-CIV, 2008 WL 4601042, at *10 (S.D. Fla. Sept. 30, 2008); *Aqua Shield, Inc. v. Inter Pool Cover Team*, No. 05-cv-4880, 2007 WL 4326793, at *2 (E.D.N.Y. Dec. 7, 2007); *In re Bulk (Extruded) Graphite Prods. Antitrust Litig.*, No. Civ. 02-6030, 2006 WL 1084093, at *2-3 (D.N.J. Apr. 24, 2006); *Ballard v. Tyco Int'l, Ltd.*, Nos. MD-02-1335-PB, 02-1335-PB, Civ. 04-CV-1336, 2005 WL 1863492, at *5 (D.N.H. Aug. 4, 2005); *Teta v. Li*, No. Civ. A 3:02-cv-2183, 2005 WL 1668093, at *3-4 (D. Conn. July 15, 2005); *Burda Media, Inc. v. Blumenberg*, No. 97-cv-7167, 2004 WL

explicitly addressed by any of the courts of appeals. Although the Second Circuit alluded to such a standard in a non-precedential summary order in *SEC v. Gottlieb*, 88 Fed. App'x 476, 477 (2d Cir. 2004) (summary order) (stating that service in a foreign country "appears to be subject to a flexible due-diligence standard"), the court cited for support only its discussion in *Gleason v. McBride*, 869 F.2d 688, 691 (2d Cir. 1989), which applied the pre-1983 version of the Federal Rules of Civil Procedure that contained neither the 120-day time limit nor the foreign country exception that currently appears in Rule 4(m). Separately, a few district courts look to whether the time to effect service is "reasonable."[7] Other district courts – including many outside of the Ninth or

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1110419, at *5-6 (S.D.N.Y. May 18, 2004); *Res. Trade Fin., Inc. v. PMI Alloys, LLC*, No. 99-cv-5156, 2002 WL 1836818, at *4 n.3 (S.D.N.Y. Aug. 12, 2002); *Yellowave Corp. v. Mana*, No. 00 Civ. 2267, 2000 WL 1508249, at *2 (S.D.N.Y. Oct. 11, 2000); *Travers Tool Co., Inc. v. S. Overseas Express Line, Inc.*, No. 98-cv-8464, 2000 WL 194781, at *1-2 (S.D.N.Y. Feb. 17, 2000); *James v. Rutil* (S.R.L.), No. IP 95-530-C-B/S, 1997 WL 151174, at *5 (S.D. Ind. Mar. 14, 1997); *Duferco Steel, Inc. v. M/V CHENNAI*, No. 96-cv-1219, 1996 WL 467299, at *1 (E.D. La. Aug. 15, 1996); *Standard Commercial Tobacco Co., Inc. v. Mediterranean Shipping Co.*, S.A., No. 94 Civ. 7040, 1995 WL 753901, at *1-2 (S.D.N.Y. Dec. 19, 1995); *In re Bernard L. Madoff Inv. Sec. LLC*, 418 B.R. 75, 83-84 (Bankr. S.D.N.Y. 2009); *In re Teligent, Inc.*, Nos. 01-12974 (SMB), 03-3577, 2004 WL 724945, at *3 (Bankr. S.D.N.Y. Mar. 30, 2004).

[7] *See Plantation Gen. Hosp., L.P. v. Cayman Islands*, No. 09-60884-CIV, 2010 WL 731853, at *1 (S.D. Fla. Feb. 26, 2010); *Baja Devs. LLC v. TSD Loreto Partners*, No. CV-09-756-PHX-LOA, 2009 WL 2762050, at *1-2 (D. Ariz. Aug. 28, 2009); *MacGirvin v. Sook*, No. 08-cv-2197-KHV, 2009 WL 424587, at *2 (D. Kan. Feb. 19, 2009); *Nabulsi v. Nahyan*, No. H-06-cv-2683, 2008 WL 1924235, at *5-6 (S.D. Tex. Apr. 29, 2008).

Seventh Circuits – follow the Ninth Circuit's approach in *Lucas* and find that the text of the Rule controls, and that the Rule imposes no time limit for foreign service.[8] The district courts are also split over whether plaintiffs must attempt service within 120 days for the foreign country exception to apply, with roughly half holding they must,[9] and half holding that they need not[10].

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[8] *See Beightler v. Produkte Fur Die Medizin AG*, No. 3:07CV1604, 2008 WL 4160589, at *3-4 (N.D. Ohio Aug. 28, 2008); *Fordham Fin. Servs., Inc. v. Ventramex S.A. de C.V.*, No. 1:06-CV-00513, 2007 WL 1598084, at *4 (S.D. Ohio June 1, 2007); *Bekaert Progressive Composites Corp. v. Wave Cyber Ltd.*, No. 06-cv-2440, 2007 WL 1585526, at *1 (S.D. Cal. May 31, 2007); *In re Copper Antitrust Litig.*, Nos. MDL 1301, 02-C-0707-C, 2003 WL 23200370, at *1 (W.D. Wis. May 30, 2003); *Flock v. Scripto-Tokai Corp.*, No. Civ.A.H-00-3794, 2001 WL 34111630, at *4-5 (S.D. Tex. July 23, 2001); *Amylin Pharms., Inc. v. Regents of Univ. of Minn.*, No. 96-cv-2061, 1998 WL 119511, at *2 n.1 (S.D. Cal. Jan. 15, 1998); *M & R Marking Sys., Inc. v. Top Stamp, Inc.*, No. CIV. 96-828, 1996 WL 805485, at *5 (D.N.J. Nov. 20, 1996); *Kim v. Frank Mohn A/S*, 909 F. Supp. 474, 479-80 (S.D. Tex. 1995); *Pa. Orthopedic Ass'n v. Mercedes-Benz A.G.*, 160 F.R.D. 58, 60-61 (E.D. Pa. 1995); *In re Southold Dev. Corp.*, 148 B.R. 726, 729-30 (E.D.N.Y. 1992); *In re Imperial Home Decor Group, Inc.*, 294 B.R. 607, 608-09 (Bankr. D. Del. 2003).

[9] *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571, 2009 WL 691920, at *2 (S.D.N.Y. Mar. 17, 2009); *Allstate Ins. Co. v. Funai Corp.*, 249 F.R.D. 157, 161-62 (M.D. Pa. 2008); *Electroweb Media, Inc. v. Mycashnow.com, Inc.*, No. 1:02-CV-133, 2006 WL 2850132, at *8 (E.D. Tenn. Sept. 29, 2006); *Teta v. Li*, No. Civ. A 3:02-cv-2183, 2005 WL 1668093, at *3-4 (D. Conn. July 15, 2005); *Yellowave Corp. v. Mana*, No. 00 CIV. 2267, 2000 WL 1508249, at *2 (S.D.N.Y. Oct. 11, 2000).

[10] *See 3M Co. v. Darlet-Marchante-Technologie SA*, No. 08-cv-827, 2009 WL 1228245, at *4-5 (D. Minn. May 5, 2009); *Rudolph v. UT*

These conflicts in the lower courts will not be resolved without intervention by this Court. Despite the fact that district courts likely will face this question more and more frequently given the expanding number of foreign litigants in an increasingly interconnected world, *see* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 174 & nn.1-5 (2008) ("Transnational cases have become a prominent feature of the litigation landscape in the United States."); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 5 (2006) (observing that "[t]he proliferation of transnational activity and globalization" will likely cause an increase in domestic litigation involving foreign defendants), this issue does not frequently reach the courts of appeals. The question of service usually occurs at the very outset of litigation and is remedied most easily simply by re-filing the complaint; at that stage a Rule 4(m) dismissal is generally appealable only as an interlocutory order. *See Montalbano*, 766 F.2d at 738 (Rule 54(b) appeal of interlocutory order); *Lucas*, 936 F.2d at 432 (interlocutory appeal under 28 U.S.C. § 1292(b)). Given that a plaintiff usually will simply re-file a complaint rather than expend the time and effort to seek an interlocutory appeal, a district court's dismissal under Rule 4(m) is usually moot by the time the case has reached the appeal stage. This Court should take this opportunity to provide guidance to the

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Starcom, Inc., No. C 07-04578, 2009 WL 248370, at *2-3 (N.D. Cal. Feb. 2, 2009); *In re S1 Corp. Sec. Litig.*, 173 F. Supp. 2d 1334, 1343 (N.D. Ga. 2001); *Cargill Ferrous Int'l v. M/V Elikon*, 154 F.R.D. 193, 195-96 (N.D. Ill. 1994); *In re Southold Dev. Corp.*, 148 B.R. 726, 729-30 (E.D.N.Y. 1992).

lower courts regarding the requirements of Rule 4(m) when service is in a foreign country. This case is an ideal vehicle for an opinion from this Court because the issue presented is separate from the merits and because it would allow this Court to provide timely guidance to the increasing number of foreign litigants in federal courts. *See* Section C, *infra*.

B. The Court of Appeals Erred in Upholding the District Court's Dismissal for Untimely Service

The Rule 4(m) conflict in the lower courts might be traced, in part, to misplaced discomfort in some courts with the result produced by a straightforward reading of the plain text. But the Ninth Circuit was correct that "the controlling language of Rule 4([m]) [is] so clear that it allows no latitude for interpretation." *Lucas*, 936 F.2d at 433. And the absence of a time limit in the Rule "recognize[s] that the timeliness of foreign service is often out of the plaintiff's control." *Nylok*, 396 F.3d at 807; *see also Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 881 (3d Cir. 1987) (noting that "the vagaries of [foreign] service render the [120-day] time limit too burdensome on a plaintiff"). Rule 4(m) is simply unavailable to address delays in foreign service, though such delays might be addressed by other rules.

The text of Rule 4(m) is unambiguous as to its inapplicability to foreign service. For domestic service only, it authorizes a district court to "dismiss the action without prejudice against th[e] defendant or order that service be made within a specified time" if the defendant "is not served within 120 days after the

complaint is filed."[11] Fed. R. Civ. P. 4(m). "[I]f the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." *Id.* But the final sentence of the Rule is simple: "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)."

Most telling from the text of the Rule is what the Rule does not say. After stating that the 120-day time limit does not apply to service in a foreign country, it does not impose a longer time period for foreign service, and it does not authorize a district court to craft a limit of its choosing. Nor does it supply a separate standard for assessing timeliness, such as the "flexible due diligence" standard the district court supplied in this case. The last sentence of the Rule articulating the foreign country exception stands alone – emphatically silent as to any alternative standard to be used to assess the timeliness of service in a foreign country and providing no authority for district courts to dismiss complaints for untimely service in a foreign country.

The Rule's silence on these counts, however strange it might seem to some courts, did not entitle the court of appeals or district court below to fashion a judicially created standard authorizing a dismissal wholly untethered – and indeed, contradictory – to the plain

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[11] Rule 4(m) applies equally to a third-party complaint. *See* Notes of Advisory Committee on 1993 amendments to Rules ("To simplify the text, the [1993 revision of Rule 4(m)] returns to the usual practice in the rule of referring simply to the plaintiff even though its principles apply with equal force to defendants who may assert claims against non-parties under Rules 13(h), 14, 19, 20, or 21.").

text of the Rule. The only fair conclusion from this text is that the 120-day time limit does not apply to service in a foreign country, and that a district court may not dismiss a complaint on Rule 4(m) grounds for exceeding that time limit for service. The court of appeals below erred by failing to give the text of Rule 4(m) its full and straightforward effect.

The requirement imposed by the court of appeals that Defendants show that they had attempted service within 120 days in order to gain the benefit of the foreign country exception, *see* App., *infra*, 7a, is also nowhere in the text of the Rule. In fact, the final sentence is clear that it is not just the 120-day time limit that does not apply to service in a foreign country, but the entirety of subsection (m). Where it is clear that service is in a foreign country, the Rule does not permit *any* time limit arising from subsection (m), specifically. Although it might be reasonable to require that foreign service be attempted within 120 days of filing, the rulemakers did not do so.

Similarly, the requirement imposed by the court of appeals and the district court below that the Principal Defendants "explain why they had not been able to effect service," App., *infra*, 7a, or show due diligence[12] or good cause, App., *infra*, 26a-27a, finds no support in the text of the Rule. Again, as Rule 4(m) makes clear, where service is in a foreign country, the entire

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[12] "Due diligence" is typically treated as a prerequisite for "good cause." *See Zamot v. Merit Sys. Prot. Bd.*, 332 F.3d 1374, 1377 (Fed. Cir. 2003) ("To establish good cause for a filing delay, an appellant must show that the delay was excusable under the circumstances and that the appellant exercised due diligence . . . .").

subsection – including the requirement that a plaintiff show "good cause" for failure to effect timely service – simply does not apply. The last sentence of the Rule would be rendered superfluous by a requirement that a plaintiff attempting to effect foreign service show good cause for untimeliness – the Rule in that case already would require that the district court "extend the time for service for an appropriate period," Fed. R. Civ. P. 4(m), and there would be no need to create an exception to the otherwise applicable time limit. The court of appeals and district court erred by imposing their own good-cause requirement untethered from Rule 4(m)'s text when, by the express terms of the Rule, service in a foreign country is exempted from that requirement.

Although the absence of a time limit for foreign service in Rule 4(m) might seem a strange result at first blush, the Ninth Circuit's observation that "[w]hether or not the Rules of Civil Procedure should be amended to deal more adequately with the question of service in foreign countries is not for [the courts] to decide" is apt. *See Lucas*, 936 F.2d at 433. Moreover, as the Seventh Circuit has noted, district courts still have recourse under the Rules to move a case along; for instance, a district court might be entitled to dismiss a case under Rule 41(b) for failure to prosecute. *See O'Rourke*, 201 F.3d at 952. But the district court in this case did not purport to exercise its discretion to dismiss pursuant to Rule 41(b) in this case, and its decision therefore cannot be upheld on that ground. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 438-40 (1983).

Simply put, in this case, where Defendants attempted to serve their third-party complaint in a

foreign country, the district court was not permitted to dismiss that complaint for failure to comply with the time limit and good-cause requirements in Rule 4(m). The decision of the court of appeals upholding the dismissal was error.

C. The Question Presented Is an Important One that Should Be Settled by this Court

The primary question raised in this petition is narrow and specific, and it addresses a broadly applicable rule of federal civil procedure governing one of the most basic requirements for initiating a lawsuit. This case presents an ideal and rare vehicle for answering this question, as the question of Rule 4(m)'s applicability is not moot here and is entirely separate from the overall merits. This Court's review would also be well-timed in light of the many opportunities the lower courts have had to weigh in on this question, and in light of the increasing importance and frequency of cross-border litigation in the federal courts.

The potential complexity and difficulty of accomplishing foreign service is reflected in the myriad methods for effecting service in a foreign country provided by Rule 4(f). The explicit exception to time limits for foreign service in Rule 4(m) reflects a recognition that a 120-day deadline for service in a foreign country would not fairly account for the real-world difficulty and expense of successfully effecting foreign service. The exception also recognizes that such a deadline would be unfair to litigants seeking to obtain redress from foreign parties, since the service process itself easily can take more than 120 days. *See, e.g.*, *Nylok*, 396 F.3d at 807.

Clarity and uniformity regarding the requirements for service and when service can be deemed timely or untimely under the Federal Rules is important not just for plaintiffs, but for foreign defendants as well. The standard for dismissing a complaint for untimely service should not depend on whether a domestic plaintiff has opted to sue in the Ninth Circuit rather than the Second Circuit. This Court's review would provide much-needed certainty to litigants of all types, as well as to the district courts that will adjudicate their disputes.

This petition also involves a more fundamental question – where to draw the line between permissible judicial interpretation of the Federal Rules of Civil Procedure and impermissible judicial rule-making that does not comply with the procedures in the Rules Enabling Act, *see* 28 U.S.C. § 2074. Absent a formal change in rules as provided by this statute, this Court should require a strict adherence to the plain text of any federal rule of civil procedure.

Finally, the time is now right for this Court to address the question of timing for foreign service. The courts of appeals, and many district courts, have already encountered this issue under a variety of factual scenarios and they have reached sharply diverging conclusions, resulting in a patchwork of conflicting standards. At the same time, the issue of service in a foreign country will only become more common as countries become more interconnected with ours, and as economies become more global. The deep, existing split in authority on Rule 4(m) will grow more untenable if this Court declines to answer the relatively straightforward question presented by this petition, particularly as litigants select forums with

Rule 4(m) interpretations more favorable to their interests.

D. Petitioners Also Intend To Argue that the Court of Appeals Erred in Failing To Allow Them To Setoff Their Contractual Claims Against Banco Union and Banco Oriental Against Banco Central's Judgment

Neither the district court nor the court of appeals below has ever addressed the merits of Defendants' breach of contract claims against Banco Union and Banco Oriental, which Defendants raised in their third-party complaint and in a counterclaim against Banco Central. Even assuming Defendants' liability for conversion as innocent recipients of an illegal transfer of funds out of Paraguay,[13] the banks may still have a contractual obligation to provide the $16-million investment to Defendants from another, legal source.[14]

An assignee's claim – such as Banco Central's claim for conversion here – is subject to setoff by way of a defendant's counterclaims against the assignor – here,

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[13] Innocent parties, like Defendants here, may still be liable for conversion under New York law. *See, e.g., Employers' Fire Ins. Co. v. Cotten*, 245 N.Y. 102, 103-05 (1927).

[14] A contract claim can exist independent of a claim for conversion under New York law. *See, e.g., N. Shore Bottling Co. v. C. Schmidt & Sons, Inc.*, 22 N.Y.2d 171, 179 (1968) ("[I]t is . . . plain that a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract." (citing, *inter alia*, *Rich v. N.Y. Cent. & Hudson River R.R. Co.*, 87 N.Y. 382, 398 (1882))).

Defendants' breach of contract counterclaims and cross-claims against Banco Union and Banco Oriental. *See First Nat'l Bank of Boston (Int'l) v. Banco Nacional de Cuba*, 658 F.2d 895, 902 (2d Cir. 1981) ("When a plaintiff sues on a claim as an assignee, the defendant may assert a counterclaim against the assignee based on a right of action against the assignor; the defendant's recovery on such a counterclaim, however, is limited to the amount of the assignee's recovery."); Samuel Williston & Richard A. Lord, *A Treatise On the Law Of Contracts* § 74:48 (4th ed. 2008) ("[T]he general principle allow[s] setoff against the assignee of claims due from the assignor."); *see also N. Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 615-23 (1894) (equitable setoff is available against assignee of action based on liability of assignor).

As alleged in Defendants' third-party complaint, Banco Union and Banco Oriental are contractually liable to Defendants based on the various agreements between them, and Banco Central's judgment on its conversion claim is subject to setoff for that liability. If the Court grants this petition for a writ of certiorari, Petitioners intend to argue that the court of appeals erred by failing to allow Defendants to setoff Banco Central's claim by any amount by which Banco Union and Banco Oriental are liable to Defendants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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